

# Michigan Judges Association

## Founded 1927

October 9, 2006

**PRESIDENT:**

HON. Nanci J. Grant  
Oakland County Circuit Court  
1200 N. Telegraph Rd  
Pontiac, MI 48341  
Office: 248-858-0358  
Fax: 248-975-9795  
e-mail: [grantn@co.oakland.mi.us](mailto:grantn@co.oakland.mi.us)

**President-Elect:**

HON. PHILIP E. RODGERS JR  
Traverse City, MI

**Vice President:**

HON. MICHAEL F. SAPALA  
Detroit, MI

**Secretary:**

HON. JEFFREY L. MARTLEW  
St Johns, MI

**Treasurer:**

HON. FRED L. BORCHARD  
Saginaw, MI

**Immediate Past President:**

HON. ROBERT M. RANSOM  
Retired

**Executive Committee:**

HON. JAMES M. ALEXANDER  
HON. LAURA L. BAIRD  
HON. JAMES M. BATZER  
HON. ANNETTE J. BERRY  
HON. SUSAN D. BORMAN  
HON. GEORGE S. BUTH  
HON. MICHAEL H. CHERRY  
HON. CHARLES D. CORWIN  
HON. ALTON T. DAVIS  
HON. JOSEPH J. FARAH  
HON. JAMES H. FISHER  
HON. SHEILA A. GIBSON  
HON. JOHN H. GILLIS JR  
HON. STEPHAN D. GORSALITZ  
HON. PAUL E. HAMRE  
HON. TIMOTHY G. HICKS  
HON. JAMES C. KINGSLEY  
HON. M. RICHARD KNOBLOCK  
HON. RICHARD RYAN LAMB  
HON. PETER J. MACERONI  
HON. LITA M. POPKE  
HON. THOMAS L. SOLKA  
HON. MARK S. SWITALSKI  
HON. DEBORAH G. TYNER  
HON. WILLIAM C. WHITBECK

**Executive Director:**  
TIM WARD

Chief Justice Clifford W. Taylor  
Michigan Supreme Court  
P.O. Box 30052  
Lansing, MI 48909

RE: ADM file no. 2003-59  
- Proposed amendment of MCR 6.302(B) by adding (B)(4) to a written waiver form.  
ADM file no. 2005-19

Dear Chief Justice Taylor:

At the September 19, 2006 meeting of the Michigan Judges Association, the Rules Committee and the Executive Board considered the above-referenced proposed amendments.

As to ADM file no. 2003-59, proposed amendment of MCR 2.112 and MCR 7.206, we support the changes regarding pleading Headlee amendment issues. We believe these special pleading requirements provide direction and clarity.

Judge Richard R. Lamb of Kalamazoo suggested that MCR 6.302(B) be amended so that a written waiver form could include the requirements of (B)(3), (B)(4), and (B)(5). The last paragraph of MCR 6.302(B) currently states:

"The requirements of sub-rules (B)(3) and (B)(5) may be satisfied by writing on a form approved by the State Court Administrative Office. If the court uses a writing, the court shall address the defendant and obtain from the defendant, orally on the record, a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights."

While MCR 6.302(B)(4) requires a judge to advise the defendant:

"If a plea is accepted, the defendant will be giving up any claim that the plea was a result of promises or threats that were not disclosed to the court at the plea proceeding, or that it was not the defendant's own choice to enter the plea."

The current Advice of Rights Waiver form does not include the mandatory language of (B)(4). We agree with Judge Lamb that it seems it would be easier and more efficient for everyone if all of the requirements to sub-rule (B) were placed in the waiver form. We agree that MCR 6.302(B) be amended to authorize the inclusion of (B)(4) in the written Advice of Rights and Waiver form, so that the Defendant can be advised that he/she is waiving in one document, rather than having a partial list in writing, and an oral notification of the requirements of (B)(4).

As to ADM file no. 2005-19, proposed amendment of rules 2.512, 2.513, 2.514, 2.515, 2.516, and 6.414 of the Michigan Court Rules regarding jury trials and instructing the jury, we provide the following recommendations:

As to MCR 2.512A, **Request for Instructions**, we suggest that it be made discretionary by writing it as follows:

The Court may require that:

- (1) The parties file written requests that the court instruct the jury on the law as stated in the requests. In the absence of a direction from the court, a party may file a written request for jury instructions at or before the close of the evidence.
- (2) After the close of the evidence, each party shall submit in writing to the court a statement of the issues and may submit the party's theory of the case regarding each issue. The statement must be concise, be narrative in form, and set forth as issues only those disputed propositions of fact that are supported by the evidence. The theory may include those claims supported by the evidence or admitted.

We have no issues with the rest of MCR 2.512 as proposed.

As to MCR 2.513, **Conduct of Jury Trial**, we believe that a court can instruct early if need be but, as to all matters, should not be mandatory. Oftentimes, proofs come in differently than expected and some issues do not go to the jury. That is why we suggest the following wording for MCR 2.513(A):

(A) Preliminary Instructions:

"After the jury is sworn and before evidence is taken, the court shall instruct the jury with pretrial instructions reasonably likely to assist in its consideration of the case. Such instructions, at a minimum, shall communicate the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. The court may provide each juror with a copy of such instructions."

We agree with MCR 2.512(B) and (C) as proposed.

As to MCR 2.513(D), **Interim Commentary**, we oppose. We believe that interim commentary is inadvisable and fraught with problems since it is presented prior to completion of proofs. It is an opportunity for attorneys to interject inappropriate argument and inaccurate analysis of the evidence presented so far, and may be distracting and misleading to the jury before all the evidence is in.

As to MCR 2.513(E), **Reference Documents**, we do not believe that the court should encourage counsel to provide jurors with reference documents or notebooks. If done at all, it should be very limited and discretionary as it poses evidentiary issues. Such a process might cause more delay in resolving argument over the materials. In addition, the information may well be more confusing to the jury than illuminating.

As to MCR 2.513(F), **Deposition Summaries**, we adamantly oppose parties preparing written summaries of depositions for reading at trial in lieu of the full depositions because the jury should hear the specific sworn testimony, not someone else's rendition. Summaries would not be subjected to the Rules of Evidence, and could be subjective, inflammatory, and inject added controversy and delay.

As to MCR 2.513(G), **Scheduling Expert Testimony**, we have no issue with (1) and (2); however, as to (3), we strongly oppose panel discussions by experts on a subject after or in lieu of testifying. This process is uncontrollable and not subject to the Rules of Evidence. In addition, we believe it would be a time-consuming and expensive process.

As to MCR 2.513(H), **Note-taking by Jurors**, we support the discretion of the court to permit jurors to take notes regarding evidence presented in court.

As to MCR 2.513(I), **Juror Questions**, we support the court permitting jurors to ask questions of witnesses, subject to scrutiny, objections of the parties outside the presence of the jury, and Rules of Evidence. Concerns are, however, with the jury losing their neutral fact-finding role and becoming an adversary, or having an over-reaction to their question not being permitted.

As to MCR 2.513(J), **Jury View**, we support the court allowing a jury view of property or place where material event occurred, like the present MCR 2.513(A).

As to MCR 2.513(K), **Juror Discussion**, we strongly oppose juror discussion until they have heard all of the evidence. We believe that it has a tendency to fix opinions discussed early, before the jurors hear all of the evidence. We also have concerns with how such a discussion would be moderated as there is no jury foreman at this time.

As to MCR 2.513(L), **Closing Arguments**, we have no issue with this as proposed.

As to MCR 2.513(M), **Comments on Evidence**, we adamantly oppose allowing the court to sum up the evidence and comment to the jury about the weight of the evidence, regardless of what instructions may be given to qualify the judge's comments. We believe that it would be difficult for the court to comment on the weight of the evidence without disclosing an opinion, and that jurors would be overwhelmingly influenced in their decision-making by the judge's comments. The opportunity for error is great.

As to MCR 2.513(N), **Final Instructions to the Jury**, we found paragraph (1) appropriate, but did not find paragraph (2) advisable to solicit questions about final instructions from the jury in a sealed envelope.

We did agree with the following provision as modified:

"If questions arise by the jury with instructions given, the court and the parties shall convene in the courtroom or by other agreed-upon means. The question shall be read into the record, and the attorneys shall offer comments on an appropriate response. The court may, in its discretion,

provide the jury with a specific response to the jury's question, but the court shall respond to all questions asked, even if the response consists of a directive for the jury to continue its deliberations."

As to paragraph (3), we support providing copies of final instructions to the jury on a discretionary basis, changing "shall" to "may". And, we agree with paragraph (4).

As to MCR 2.513(O), **Materials in the Jury Room**, we support that, on a discretionary basis, the court may permit the jurors to take materials into the jury room.

As to MCR 2.513(P), **Provide Testimony or Evidence**, we support the court having discretion to provide testimony or evidence that has not been allowed into the jury room under sub-rule (O).

In summary, we believe that many of the proposed changes are fine if discretionary and not mandatory. It is a trial judge's obligation to ensure that the case proceeds in an orderly and efficient manner, and that the law is given to the jury in appropriate instructions. Judges should have discretion to discharge this obligation, depending on the needs of each case. What is needed and workable in one case might not be necessary or workable in another.

We thank the Court for considering our input on these matters. If the Michigan Judges Association may provide further information or assistance, please do not hesitate to contact us.

Sincerely,

MICHIGAN JUDGES ASSOCIATION



Honorable Nanci J. Grant, President  
Circuit Judge, Sixth Circuit Court

cc: Corbin R. Davis, Clerk of the Michigan Supreme Court  
Hon. Stephen D. Gorsalitz, Rules Committee Chairperson  
Hon. Jeffrey L. Martlew, Secretary of MJA  
✓ Anne Boomer, Administrative Counsel